UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RANDAL DOCK,

Plaintiff,

vs.

STATE OF NEVADA et al.,

Defendants.

2:10-cv-00275-RCJ-LRL

ORDER

This case arises out of allegations of sexual abuse and the deprivations of liberty and property Plaintiff suffered due to them. Pending before the Court are Defendants Clark County's and Dona Lisa Ford's ("County Defendants") Motion to Dismiss (ECF No. 5) and Motion for Hearing on County Defendants' Motion to Dismiss Original Complaint, or, in the Alternative, Motion to Dismiss Amended Complaint (ECF No. 10). For the reasons given herein, the Court grants the motions.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is the natural father of a minor child. (Am. Compl. ¶ 10). Shortly after Plaintiff filed a motion in state court to terminate child support, the child's mother reported alleged sexual abuse of the child by Plaintiff to the Las Vegas Metropolitan Police Department. (*Id.* ¶ 11). Plaintiff maintains that the sole evidence of abuse was the mother's allegations, unfounded by any medical or documentary evidence. (*Id.* ¶¶ 12–13, 15). Plaintiff alleges that the mother

"manipulat[ed]" the child's testimony, although Plaintiff does not explicitly state whether the child testified against him. (*See id.* ¶ 14). Defendant Dona Lisa Ford, a caseworker for the Clark County Department of Child and Family Services, which is in turn a department of Defendant Clark County, investigated the claims and issued a no-contact order and non-judicial "Safety Assessment Plan" without a hearing. (*Id.* ¶¶ 3–4, 17–18). Ford advised the mother to obtain a temporary protective order, which a judge issued, resulting in the revocation of Plaintiff's firearm. (*Id.* ¶¶ 19–20). Ford also convinced the judge at Plaintiff's child support hearing to "issue a continuing no contact order." (*Id.* ¶ 25).[1] Plaintiff believes his name was placed on the Central Registry for Child Abusers. (*Id.* ¶ 28). Plaintiff claims never to have had any reasonable opportunity to be heard, (*id.* ¶ 29), and that Ford and Clark County ignored evidence that impugned the mother's credibility, specifically a "court decision" from an unidentified court, (*id.* ¶ 30). Eventually, proceedings were dismissed with prejudice in juvenile court, and criminal and administrative proceedings against Plaintiff were dismissed in 2008. (*Id.* ¶¶ 32, 34–35).

Plaintiff sued Defendants State of Nevada, Clark County, and Ford in the Clark County District Court on January 19, 2010. Plaintiff did not sue the mother. The Complaint lists six causes of action: (1) violations of substantive due process and procedural due process rights pursuant to 42 U.S.C. § 1983 (against Ford); (2) failure to train pursuant to 42 U.S.C. § 1983 (against the State of Nevada and Clark County); (3) civil conspiracy (against Ford and Clark County); (4) negligence (against Ford and Clark County); (5) negligent infliction of emotional distress ("NIED") (against Ford and Clark County); and (6) injunctive and declaratory relief. Defendants removed and filed the present motion to dismiss. A response was due on April 1, 2010, but instead of responding, Plaintiff filed the Amended Complaint ("AC"). The AC provides no meaningful amendment to correct alleged deficiencies noted in the motion to

[1]It is not clear if this was an extension of the original order allegedly issued by Ford herself, a new order, or the only order.

dismiss. It is amended only in the following ways: (1) Doe and Roe defendants are removed; (2) Ford is alleged to have acted "at the direction of Clark County," (*see* Am. Compl. ¶¶ 4, 8, 41, ECF No. 8), which is already implied in the original Complaint; (3) Plaintiff adds a legal conclusion that Ford's conduct involved no discretion, (*see id.* ¶ 8); and (4) Plaintiff has changed the damages allegations from "in excess of $10,000" to "in an amount according to proof," (*see id.* ¶¶ 42, 53, 60, 65, 70). Plaintiff has not bothered to alter the prayer for damages accordingly. (*See id.* at 11:11–13). These de minimis amendments are not sufficient to render the present motion to dismiss moot, and the Court therefore grants the Motion for Hearing on County Defendants' Motion to Dismiss Original Complaint (ECF No. 10) and will rule on the Motion to Dismiss (ECF No. 5) directly.

II. LEGAL STANDARDS

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory,

unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly v. Bell Atl. Corp.*, 550 U.S. 554, 555 (2007)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

B. Declaratory Relief

Federal courts may enter declaratory judgments:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201. However, such judgments may not cross the line into advisory opinions; there must be a case or controversy cognizable under Article III of the Constitution. *Calderon v. Ashmus*, 523 U.S. 740, 745–46 (1998). In other words, the harm alleged must be complete or

imminent, not "hypothetical." *See id.* at 746.

C. 42 U.S.C. § 1983

The Eleventh Amendment prohibits suits against states in federal court without their consent. In a parallel but independent analysis, 42 U.S.C. § 1983 only creates jurisdiction for suits against "persons." Neither a state nor its employees acting in their official capacities are "person[s]" who can be sued under § 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989), but state employees may be sued in their individual capacities as "persons" under § 1983, *Hafer v. Melo*, 502 U.S. 21, 27 (1991). State employees sued in their individual capacities for injunctive relief or for damages to be paid out of their private resources are not protected by a state's Eleventh Amendment immunity. *Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974); *Ex parte Young*, 209 U.S. 123, 159–60 (1908). Employees of Clark County and its departments are not employees of the State of Nevada but of a municipality, Clark County, and they may therefore be sued in their individual or official capacities under § 1983, and Clark County may itself be sued. *See Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

In order to hold a municipality liable under *Monell* for declaratory, injunctive, or monetary relief, the allegedly unconstitutional actions must have been pursuant to an official municipal policy, ordinance, regulation, or officially adopted decision. *Id.* at 690–91. The Ninth Circuit has expounded:

> In a *Monell* claim, there are three ways to show a policy or custom of a municipality: (1) by showing a longstanding practice or custom which constitutes the standard operating procedure of the local government entity; (2) by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate.

Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 964 (9th Cir. 2008) (citations and internal quotation marks omitted). Prospective injunctive relief may be had against a municipality's enforcement of an allegedly unconstitutional state policy even if the municipality itself has only

adopted the policy through enforcement. *Chaloux v. Killeen*, 866 F.2d 247, 250–51 (9th Cir. 1989). In any case, "[l]iability under section 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under section 1983." *Id.*

Additionally, individuals in their private capacities (but not municipalities or individuals in their official capacities) enjoy qualified immunity against claims of constitutional violations where the right alleged to have been violated was not clearly established at the time of the alleged violation. *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1993) (citing *Owen v. City of Independence*, 445 U.S. 662, 638 (1980)). Under *Saucier v. Katz*, a district court uses a two-step procedure to determine whether an official is entitled to qualified immunity: (1) the court asks whether there has been a constitutional violation; and (2) if so, the court asks whether the state of the law at the time of the alleged violation was clear such that a reasonable person in the defendant's position should have known his actions violated the plaintiff's rights. 533 U.S. 194, 201 (2001). Under *Pearson v. Callahan*, it is within the sound discretion of a district court which *Saucier* step to employ first; the court may examine the second step first in order to avoid constitutional holdings where a defendant will be free from liability due to qualified immunity in any case. 129 S. Ct. 808, 818 (2009).

III. ANALYSIS

A. Immunity

Defendants argue that many of the claims are barred by various immunities. Defendants argue that all § 1983 claims against Ford should be dismissed based on qualified immunity, that all state law claims against Ford should be dismissed based on discretionary immunity, that causes of action two through five should be dismissed as against Clark County insofar as they

rely on a respondeat superior theory, and that Ford and any prosecutors enjoy quasi-judicial immunity against any claims arising out of their prosecution of criminal or civil proceedings against Plaintiff. Defendants are correct on all counts.

Ford enjoys discretionary immunity for her investigative actions as a child protective services worker, because those acts involve discretion and are grounded in social policy. *See Martinez v. Maruszczak*, 168 P.3d 720, 728–30 (Nev. 2007); *Foster v. Washoe Cnty.*, 964 P.2d 788, 794 (Nev. 1998). The claims against Ford are also barred by quasi-judicial immunity.

Defendants argue that causes of action two through five must be dismissed as against Clark County insofar as they rely on a respondeat superior theory. *Taylor*, 880 F.2d at 1045. It is correct that the third through fifth causes of action for civil conspiracy, negligence, and NIED, respectively, rely on a respondeat superior theory, because they are based on the individual actions of the County's employees. These causes of action are dismissed as against the County for this reason. However, Plaintiff necessarily alleges policies or officially adopted decisions of the County in the second cause of action for failure to train. This cause of action does not rely on a respondeat superior theory and will not be dismissed as against the County under *Taylor*. In summary, only the second cause of action for failure to train under 42 U.S.C. § 1983 survives *Taylor* as against the County.

The question remains whether immunity should stretch so far as to immunize a municipality itself for its alleged deliberate indifference in failing to train an assistant of the courts, such as a child protective services worker, simply because the latter enjoys immunity for the alleged unconstitutional acts. The Court finds that it does. Last year, the Supreme Court unanimously reversed the Ninth Circuit in holding that a district attorney's office enjoys absolute immunity against failure-to-train claims arising out of one of its attorney's prosecution-related actions. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009). The *Van de Kamp* Court noted that with respect to prosecution-related actions, an office's "*general* methods of

supervision and training" are not distinguishable from direct supervisory decisions. *Id.* at 862. This is a commonsense ruling. If the rule were otherwise, a plaintiff could easily circumvent the immunity doctrines by suing a municipality directly and arguing it "failed to train" the judge and/or prosecutor. The same reasoning applies to a child protective services worker acting in her investigative capacity. The Court therefore grants the motion to dismiss as to the second cause of action.

Next, Defendants argue that Ford and any prosecutors enjoy quasi-judicial immunity against claims arising out of their prosecution of criminal proceedings in the district court or civil proceedings in the juvenile court.[2] Defendants are correct. State (and presumably county) employees engaged in child protective services have quasi-judicial immunity from suit according to the following parameters:

> State employees engaged in child protective services are entitled to quasi-judicial immunity when they provide information to the court (e.g., reports, case plans, testing evaluations and recommendations) pertaining to a child who is or may become a ward of the State. We do not intend the aforementioned examples to be an exclusive list. Rather, they demonstrate some of the duties protective service workers engage in that are integral to the court's decision-making processes. When a state agency or its employees provide their decision-making expertise to the court, they act as an arm of the court and are entitled to absolute quasi-judicial immunity. However, once the court makes a decision ratifying the recommendations of the state agency (e.g., placement in foster care, need for further medical evaluation, etc.), the state agency and its employees are no longer acting as an arm of the court. Rather, their function in carrying out the order of the court falls within the executive branch of government and pursuant to their statutory duties. Specifically, quasi-judicial immunity does not apply to state agencies or their employees for the day-to-day management and care of their wards.
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> This conclusion accords with the analysis set forth by the United States Supreme Court in *Butz* and followed by this court in *Duff*. Specifically, child welfare workers engaged in protective service evaluations function as advisors to the court. They provide recommendations based upon their expertise and judgment upon which the courts base their determinations. Thus, in this limited capacity, child welfare workers provide an invaluable and singular service to the court, offering

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[2]Plaintiff's fourth cause of action for "negligence" is better characterized as a malicious prosecution claim. Plaintiff names no prosecutors from either the criminal or civil proceedings against him, but only Ford and Clark County.

> recommendations within adversarial proceedings between the state and the natural parent. Further, were child welfare workers subject to personal liability for every recommendation made to the court in these situations, the judicial system would be overburdened with civil suits and such liability would likely prevent competent persons from taking positions as child welfare workers as the threat of lawsuit would discourage independent action. Additionally, opening the gate to personal liability for recommendations made to the court by child welfare workers would impede the resolution and finalization of petitions seeking the safe placement of this State's children. Finally, adequate procedural safeguards exist within the system to protect against unconstitutional conduct by a state employee or agency which precludes the necessity for civil liability for recommendations made to the court on the issues of child welfare (i.e., appellate review, professional disciplinary proceedings, etc.). *See Butz*, 438 U.S. at 513–17, 98 S. Ct. 2894; *Duff*, 114 Nev. at 569, 958 P.2d at 85.

State v. Second Judicial Dist. Ct. ex rel. County of Washoe, 55 P.3d 420, 426–27 & n.42 (Nev. 2003). Plaintiff alleges the following acts of wrongdoing by Ford: malicious or negligent investigation of the abuse claims against him; issuance of a no-contact order in conjunction with a non-judicial "Safety Assessment Plan"; and assistance with Plaintiff's prosecution in district and/or juvenile court. Ford clearly enjoys quasi-judicial immunity from the claims in this case, as they arise out of her investigation and recommendations to the juvenile and/or criminal courts. None of the actions complained of arise out of the day-to-day management or care of the minor child in this case, for which there would be no quasi-judicial immunity.

In conclusion, Ford and Clark County are immune from all claims against them. The State of Nevada has not joined the present motion.[3] Therefore, after the immunity analysis two causes of action remain: (1) failure to train against the State of Nevada; and (2) injunctive and declaratory relief against all defendants.

B. Failure to Train (State of Nevada)

Constitutional harm from a municipality's failure to train its officers is cognizable under § 1983 and *Monell*, but the level of culpability is higher than that under a state law failure-to-

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[3]The State of Nevada has waived its common-law sovereign immunity by statute, *see* Nev. Rev. Stat. § 41.031(1), and although it retains its Eleventh Amendment protection from suit in federal court generally, *see* § 41.031(3), it has waived it in this case by consenting to removal, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

train claim based on a negligence theory:

> [T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.

City of Canton, Ohio v. Harris, 489 U.S. 378, 388–89 (1989). In order for the second cause of action to survive the present motion, Plaintiff must make plausible that the State of Nevada's training of Ford as a child protective services caseworker was so lacking that it amounted to "deliberate indifference."

Plaintiff alleges that neither Clark County nor the Department of Child and Family Services had any training budget or staff, that the State of Nevada provided no funding to either Clark County or the Department of Child and Family Services, and that neither the State of Nevada nor Clark County provided any training to employees such as Ford, although they both had a duty to train her. (Am. Compl. ¶¶ 47–50). This allegation is insufficient to make out a claim for intentional violation of a constitutional right or deliberate indifference. In any case, the State of Nevada is immune from this claim under *Van de Kamp*, and Plaintiff has abandoned his claims as against the State of Nevada. 129 S. Ct. at 862.

C. Injunctive and Declaratory Relief

Plaintiff originally sought a declaration that Nevada Revised Statutes ("NRS") sections 432B.300, 432B.310, and 432.100—the sections of the code that establish and govern the Central Registry for the Collection of Information Concerning the Abuse or Neglect of a Child—are unconstitutional under the Due Process Clause of the Fourteenth Amendment. He also sought an injunction against their further implementation. At oral argument, the parties agreed that Plaintiff could only bring this constitutional claim against the State of Nevada and that Plaintiff and the State had stipulated to dismiss Plaintiff's claims against the State.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Hearing on County Defendants' Motion to Dismiss Original Complaint (ECF No. 10) is GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 5) is GRANTED.

IT IS SO ORDERED.

Dated this 27th day of December, 2010.

ROBERT C. JONES
United States District Judge